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# Resolution of Conflicting "Other Insurance" Clauses: New Developments in Indiana

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# RECENT DEVELOPMENTS

## RESOLUTION OF CONFLICTING "OTHER INSURANCE" CLAUSES: NEW DEVELOPMENTS IN INDIANA

Recently, a federal district court<sup>1</sup> was faced with the frequently litigated question of determining the relative liability of two insurance companies providing concurrent coverage for the same loss. The question arose over an automobile accident in which Salvadore Pol, while operating Jose Venegas's automobile, injured Will Winfield. Pol's insurer, Allstate Insurance Company,<sup>2</sup> covered his liability since the policy provided coverage whenever he operated a non-owned vehicle.<sup>3</sup> Venegas was insured by American Underwriters Incorporated,<sup>4</sup> and his policy extended coverage to Pol under its omnibus clause which protected any person operating Venegas's automobile with his permission.<sup>5</sup> Therefore, Pol, who was facing a tort action by the injured Winfield, had liability coverage from both Allstate and American. Both policies, however, had provisions commonly known as "other insurance" clauses limiting the insurers' liability in the event their insured had coverage from another policy. Allstate's policy contained an excess "other insurance" clause,<sup>6</sup> while the American policy had an escape provision.<sup>7</sup> Allstate brought a declaratory judgment action in the Federal Court of the Northern District of Indiana to determine which insurance company would be primarily liable. Judge Beamer, in the absence of any reported Indiana case law, adopted the minority view<sup>8</sup> by finding the clauses mutually repugnant and ordering the liability to be prorated between the insurers on the basis of their respective limits of liability.

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1. Allstate Ins. Co. v. American Underwriters, Inc., 312 F. Supp. 1386 (N.D. Ind. 1970).

2. Hereinafter referred to as Allstate.

3. 312 F. Supp. at 1387 n. 2.

4. Hereinafter referred to as American.

5. 312 F. Supp. at 1387 n. 2.

6. If there is other insurance . . .

Allstate shall not be liable under this Part I [bodily injury and property damage] for a greater proportion of any loss than the applicable limit of liability stated on the Supplement Page bears to the total applicable limit of liability of all collectible insurance against such loss; provided, however, *the insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance.*

*Id.* at 1387.

7. If the insured has other insurance against loss to which the liability coverage applies, then this policy shall not in any way apply . . . It is the intent of this provision to make this policy's liability coverages contingent upon the non-existence of other insurance.

*Id.*

8. See notes 37-80 *infra*, and accompanying text.

Although there is no Indiana precedent on this issue, there is little doubt that insurers within the state have adopted the majority view as a rule of practice.<sup>9</sup> Under the majority view the liability of insurers is allocated on a primary and secondary basis through a construction of the "other insurance" clauses.<sup>10</sup> Since the federal court's decision is not conclusive as to the ultimate direction Indiana law will take, the purpose of this note is to examine the basis for both views in an attempt to evaluate their relative merits.

The occurrence of concurrent insurance coverage, circumstances in which an insured's loss is covered by two<sup>11</sup> or more<sup>12</sup> insurers, results primarily from non-owned vehicle clauses and statutorily required omnibus clauses<sup>13</sup> in liability policies. Insurance companies insert "other insurance" provisions<sup>14</sup> in their policies in an attempt to reduce or eliminate liability in these peripheral areas in the event the insured has other coverage.<sup>15</sup>

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9. Conclusion drawn by the writer from conversations with various members of the Indiana bar.

10. *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St. 2d 45, 261 N.E.2d 128 (1970), and *New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London*, 34 Ill.2d 424, 216 N.E.2d 665 (1966), are recent examples of courts in neighboring jurisdictions affirming the majority view's method of reconciliation. Both decisions are based on extremely tenuous technical constructions of the language found in the policies. The only significance which may be attached to these cases is that they refute the existence of a consistent trend to accept the minority position. See also note 37 *infra* for a list of states which have adopted the majority view.

11. See, e.g., *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W. 2d 583 (Tex. 1969); *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *Pacific Indem. Co. v. Liberty Mut. Ins. Co.*, 269 Cal. App. 2d 793, 75 Cal. Rptr. 559 (1969); *Indiana Lumbermans Mut. Ins. Co. v. Mitchell*, 409 F.2d 392 (7th Cir. 1969); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959); *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W. 2d 413 (1970).

12. See, e.g., *General Ins. Co. v. Saskatchewan Gov't Ins. Office*, 238 Ore. 8, 391 P.2d 616 (1964); *Marwell Constr., Inc. v. Underwriters at Lloyd's, London*, —Alas.—, 465 P.2d 298 (1970); *Lubow v. Morrissey*, 13 Wis.2d 114, 108 N.W.2d 156 (1961).

13. See, e.g., IND. ANN. STAT. § 39-4309 (Burns Repl. 1965). See generally 7 J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 4353 (2d ed. 1962); 7 D. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 315.6 (3d ed. 1966); 12 G. COUCH, *COUCH ON INSURANCE* 2d § 45:309 (2d ed. Anderson 1964); Note, *Automobile Liability Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838, 840 (1954) [hereinafter cited as *Automobile Liability Insurance*].

14. Much of the language used in the "other insurance" clauses is derived from property insurance area where it was used to prevent the moral temptation of destroying one's property subsequent to insuring it with numerous insurers for a total greater than its true value. See generally *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 586 (Tex. 1969); Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319, 320 (1965) [hereinafter cited as *Concurrent Coverage*]; *Automobile Liability Insurance*, *supra* note 13, at 840; Smith, *The Proratio Clause*, 1949 INS. L.J. 83, 84; 9 G. COUCH, *supra* note 13, at §§ 37:1291-92.

15. See *Concurrent Coverage*, *supra* note 14, at 320; *Automobile Liability Insurance*, *supra* note 13, at 839.

Generally "other insurance" clauses take one of the following three forms: (1) *prorata*<sup>16</sup> clauses which provide that the insurer will be liable only for a prorata share of the loss, usually in proportion to the limits of liability of its policy in relation to the limits of liability of all other valid and collectable insurance; (2) *excess*<sup>17</sup> clauses which provide that the insurer will be liable for any loss which exceeds the limits of liability of all other valid and collectable insurance; and (3) *escape*<sup>18</sup> clauses which provide that the policy affords no coverage if other insurance is available. In addition, some policies contain combinations of the above types.<sup>19</sup>

The principle case presents one of the most common situations where concurrent insurance coverage exists. However, it by no means exhausts the circumstances under which this problem may arise.<sup>20</sup> Other

16. See, e.g., *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 118, 341 P.2d 110, 114 (1959):

If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability . . . bears to the total applicable limit of all valid and collectable insurance. . . .

17. *Id.* at 118, 341 P.2d at 114: "If the Insured's liability under this policy is covered by any other valid and collectable insurance, then this policy shall act as excess insurance over and above such other insurance."

18. See, e.g., *New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co.*, 18 F. Supp. 707, 709 (W.D. Ky. 1937):

If any other Assured included in this insurance is covered by valid and collectable insurance against a claim also covered by this Policy, he shall not be entitled to protection under this Policy.

See notes 64-74 *infra* and accompanying text for a discussion of a variation of this type of clause.

19. See, e.g., note 6 *supra* for *prorata-excess* clause; *escape-excess*—*Insurance Co. of Texas v. Employers Liab. Assurance Corp.*, 163 F. Supp. 143, 144 (S.D. Cal. 1958):

If other valid insurance exists protecting the insured from liability for such bodily injury . . . or destruction of property, this policy shall be null and void with respect to such specific hazard otherwise covered, whether the insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other insurance.

*prorata-escape*—*New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co.*, 18 F. Supp. 707, 709 (W.D. Ky. 1937):

If the named Assured carries any other Insurance covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectable concurrent insurance. If any other Assured included in this insurance is covered by valid and collectable insurance against a claim also covered by this Policy, he shall not be entitled to protection under this Policy.

20. See Billings, *The "Other Insurance" Provision of the Automobile Policy*, 1949 Ins. L.J. 498, in which the author lists eight situations where concurrent coverage may arise. See also Rollins, *Conflicting Automobile Coverage*, 64 N.J.L.J. 329 (1941); *Automobile Liability Insurance*, *supra* note 13, at 839.

recurring concurrent coverage problem areas are with leased vehicles,<sup>21</sup> new car tryouts,<sup>22</sup> and "loaners" from garages.<sup>23</sup>

In the initial years of the problem of concurrent insurance coverage three theories were used to settle the question.<sup>24</sup> The "prior-in-time" theory, which developed out of property law concepts,<sup>25</sup> assigned primary liability to the insurer whose policy became effective first.<sup>26</sup> Apparently no jurisdiction follows this approach today, since courts quickly realized that this inquiry is irrelevant where each policy was in effect at the time the insured's liability arose.<sup>27</sup>

The "primary tortfeasor" theory held the insurer primarily liable in whose policy the negligent party was the named insured.<sup>28</sup> Although

21. See, e.g., *Pacific Indem. Co. v. Liberty Mut. Ins. Co.*, 269 Cal. App.2d 793, 75 Cal. Rptr. 559 (1969); *Consolidated Mut. Ins. Co. v. Bankers Ins. Co.*, 244 Md. 392, 223 A.2d 594 (1966); *Federal Ins. Co. v. Atlantic Nat'l Ins. Co.*, 25 N.Y.2d 71, 250 N.E.2d 193, 302 N.Y.S.2d 769 (1969); *Grasberger v. Liebert & Obert, Inc.*, 335 Pa. 491, 6 A.2d 925 (1939); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959); *United Services Auto. Ass'n v. Hartford Accident & Indem. Co.*, 220 Tenn. 120, 414 S.W.2d 836 (1967).

22. See, e.g., *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

23. See, e.g., *Indiana Lumbermans Mut. Ins. Co. v. Mitchell*, 409 F.2d 392 (7th Cir. 1969); *Employer Mut. Cas. Co. v. MFA Mut. Ins. Co.*, 384 F.2d 111 (10th Cir. 1967); *Federal Ins. Co. v. Prestemon*, 278 Minn. 218, 153 N.W.2d 429 (1967); *Graves v. Traders & Gen. Ins. Co.*, 252 La. 709, 214 So.2d 116 (1968); *State Farm Mut. Auto. Ins. Co. v. Travelers Indem. Co.*, 301 F. Supp. 1131 (D. Colo. 1969); *Faltersack v. Vanden Boogaard*, 39 Wis.2d 64, 158 N.W.2d 322 (1968).

24. See generally *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 586-88 (Tex. 1969); *Automobile Liability Insurance*, *supra* note 13, at 841-47; *Concurrent Coverage*, *supra* note 14, at 321-22; *Watson, The "Other Insurance" Dilemma*, 1966 Ins. L.J. 151, 153-54; Comment, "Other Insurance" Clauses: The LAMB-WESTON Doctrine, 47 ORE. L. REV. 430, 432-33 (1968).

25. See W. VANCE, *HANDBOOK ON THE LAW OF INSURANCE* § 144, at 842 (3d ed. Anderson 1951); Note, "Other Insurance" Clauses Conflict, 5 STAN. L. REV. 147, 148 (1952); *Automobile Liability Insurance*, *supra* note 13, at 845.

26. *New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co.*, 108 F.2d 653 (6th Cir. 1940). See also W. VANCE, *supra* note 25, at 842-44; *Kearns Coal Corp. v. United States Fidelity & Guar. Co.*, 118 F.2d 33, 35 (2d Cir. 1941), *cert. denied*, 313 U.S. 579 (1941); *Air Transp. Mfr. Co. v. Employers Liab. Assurance Corp.*, 91 Cal. App.2d 129, 204 P.2d 647 (1949). *Contra*, *Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 29 Minn. 347, 13 N.W. 164 (1882), where a "voiding" clause of the first policy was given effect in a fire insurance case making the subsequent insurer liable.

27. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 587 (Tex. 1969); *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413, 417 (1970); *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 209 F. Supp. 83, 89 (N.D. W.Va. 1962); *Automobile Liability Insurance*, *supra* note 13, at 846.

28. *Commercial Cas. Ins. Co. v. Hartford Accident & Indem. Co.*, 190 Minn. 528, 252 N.W. 434 (1934); *American Auto. Ins. Co. v. Pennsylvania Mut. Indem. Co.*, 161 F.2d 62 (3d Cir. 1947); *Maryland Cas. Co. v. Bankers Indem. Ins. Co.*, 51 Ohio App. 323, 200 N.E. 849 (1935). See *Concurrent Coverage*, *supra* note 14, at 322; *Automobile Liability Insurance*, *supra* note 13, at 843-44.

this rule is occasionally used,<sup>29</sup> it has generally been rejected because liability policies are purchased with the intent of covering persons not specifically named,<sup>30</sup> and because the primary tortfeasor frequently is not named in either policy.<sup>31</sup>

Finally, the "specific-general coverage" theory determined the primary insurer on the basis of which policy provided more specific coverage of the insured's loss.<sup>32</sup> This method of liability allocation initially arose in situations where one insured held two policies.<sup>33</sup> Although some language has been borrowed from this area,<sup>34</sup> the theory has been disregarded as inapplicable to the instant problem.<sup>35</sup>

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29. In the case of *Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co.*, 5 Ariz. App. 174, 424 P.2d 465 (1967), "M" permitted "J", an employee of a garage, to take her car to the garage for repair, however, while driving the car to the garage "J" negligently caused injury to an innocent third party. The issue before the court was which insurer should be held primarily liable: the insurer of the owner "M" (Dairyland) or the insurer of the garage (Universal). The court found for the owner's insurer stating that "[s]ince Dairyland's insured, was at most passively negligent, her (and Dairyland's) liability would be secondary." *Id.* at 178, 424 P.2d at 468. The court's adherence to the "primary tortfeasor" theory is even more evident in the following statement found in a subsequent opinion denying a motion for rehearing:

[W]e are dealing with a question of dual or concurrent coverage and although we will admit that there is respectable authority to the contrary, we believe and hold that as between insurance policies the policy covering the primary tortfeasor will provide primary coverage.

5 Ariz. App. 296, 299, 425 P.2d 866, 869 (1967). This decision was overruled in *Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co.*, 102 Ariz. 518, 433 P.2d 966 (1968) in which the court adopted the majority view of liability allocation discussed at length in notes 37-80 *infra*.

30. See, e.g., *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1962). See also Watson, *The "Other Insurance" Dilemma*, 1966 Ins. L.J. 151, 153.

31. See *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959); *Zurich Gen. Accident & Liab. Ins. Co. v. Clamor*, 124 F.2d 717 (7th Cir. 1941).

32. *Hartford Steam Boiler Inspection and Ins. Co. v. Cochran Mills & Ginnery Co.*, 26 Ga. App. 288, 105 S.E. 856 (1921); *Trinity Universal Ins. Co. v. General Accident Fire and Life Assurance Corp.*, 138 Ohio St. 488, 35 N.E.2d 836 (1941) (alternative holding); *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 18 Cal.2d 731, 117 P.2d 661 (1941); 8 J. APPLEMAN, *INSURANCE LAW AND PRACTICE*, § 4914, at 400 (2d ed. 1962).

33. The leading case involving this method of conflict resolution is *Hartford Steam Boiler Inspection and Ins. Co. v. Cochran Mill & Ginnery Co.*, 26 Ga. App. 288, 105 S.E. 856 (1921), where the court held insurer "A" primarily liable to pay the insured's liability to an injured employee because "A"'s coverage, under the circumstances of the injury, was specifically limited to personal injuries of employees; whereas, "B", the insured's other insurer, covered losses to property as well as personal injuries of employees.

34. See *Zurich Gen Accident & Liab. Ins. Co. v. Clamor*, 124 F.2d 717, 720 (7th Cir. 1942).

35. See, e.g., *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.*, 45 Cal. App.2d 288, 114 P.2d 34, (1941); *Employers Liab. Assurance Corp. v. Pacific*

These three theories which courts have employed and then rejected over the years emphasize the extreme difficulties inherent in resolving the instant problem. Evidence of Judge Beamer's realization of the unsatisfactory evolution of this area of the law and the problems it presents are found in his statement that "[N]umerous courts in other jurisdictions have wrestled with it, but the only result has been the gradual emergence of two more or less dominant approaches."<sup>36</sup>

### Majority View

The leading case for the majority<sup>37</sup> view is *Zurich General Accident & Liability Insurance Co. v. Clamor*.<sup>38</sup> On facts nearly identical to those

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Employers Ins. Co., 102 Cal. App. 2d 188, 227 P. 2d 53 (1951); *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 588 (Tex. 1969); *Iowa Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413, 417 (1970); *Continental Cas. Co. v. Suttentfield*, 236 F.2d 433, 438 (5th Cir. 1956); Note, *Conflicting Interpretations of "Other Insurance" Clauses*, 28 IND. L.J. 429, 442 (1953); *Automobile Liability Insurance*, *supra* note 13, at 842.

36. 312 F. Supp. at 1387.

37. Those states following the majority rule are: *Alabama*—*Continental Nat'l Am. Group v. Burleson*, 283 Ala. 671, 220 So.2d 611 (1969); *Arizona*—*Dairyland Mut. Ins. Co. v. Andersen*, 102 Ariz. 515, 433 P.2d 963 (1967); *Arkansas*—*Jones v. Morrison*, 284 F. Supp. 1016 (W.D. Ark. 1968); *California*—*Pacific Indem. Co. v. Liberty Mut. Ins. Co.*, 269 Cal. App.2d 793, 75 Cal. Rptr. 559 (1969); *Connecticut*—*American Motorists Ins. Co. v. Weir*, 132 Conn. 557, 46 A.2d 7 (1946); *Florida*—*Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954); *Illinois*—*New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London*, 34 Ill.2d 424, 216 N.E.2d 665 (1966); *Kansas*—*Maryland Cas. Co. v. American Family Ins. Group*, 199 Kan. 373, 429 P.2d 931 (1967); *Kentucky*—*Government Employees Ins. Co. v. Globe Indem. Co.*, 415 S.W.2d 581 (Ky. 1967); *Maryland*—*Consolidated Mut. Ins. Co. v. Bankers Ins. Co.*, 244 Md. 392, 223 A.2d 594 (1966); *Massachusetts*—*August A. Busch & Co. v. Libery Mut. Ins. Co.*, 339 Mass. 239, 158 N.E.2d 351 (1959); *Michigan*—*Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 273 F.2d 189 (6th Cir. 1959); *Minnesota*—*Federal Ins. Co. v. Prestemon*, 278 Minn. 218, 153 N.W.2d 429 (1967); *Mississippi*—*International Service Ins. Co. v. Ballard*, 216 So.2d 535 (Miss. 1968) (dictum); *Missouri*—*Fidelity & Cas. Co. v. Western Cas. & Sur. Co.*, 337 S.W.2d 566 (Mo. App. 1960); *Montana*—*Mountain States Mut. Cas. Co. v. American Cas. Co.*, 135 Mont. 475, 342 P.2d 748 (1959); *Nebraska*—*Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959); *New Jersey*—*American Sur. Co. v. American Indem. Co.*, 8 N.J. Super. 343, 72 A.2d 798 (1950); *New Mexico*—*State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (1967); *New York*—*General Accident Fire & Life Assur. Corp. v. Piazza*, 4 N.Y.2d 659, 152 N.E.2d 236, 176 N.Y.S.2d 976 (1958); *North Carolina*—*Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967); *North Dakota*—*State Farm Mut. Auto. Ins. Co. v. Northwest Leasing Corp.*, 299 F. Supp. 630 (D. N.D. 1969); *Ohio*—*State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St.2d 45, 261 N.E.2d 128 (1970); *Oklahoma*—*Fireman's Fund Ins. Co. v. Underwriters Ins. Co.*, 389 F.2d 767 (10th Cir. 1968); *Pennsylvania*—*Grasberger v. Liebert & Obert, Inc.*, 335 Pa. 491, 6 A.2d 925 (1939); *South Carolina*—*Wrenn & Outlaw, Inc. v. Employers Liability Assur. Corp.*, 246 S.C. 97, 142 S.E.2d 741 (1965); *Utah*—*Russell v. Paulson*, 18 Utah2d 157, 417 P.2d 658 (1966); *Washington*—*General Ins. Co. of America v. State Farm Ins. Co.*, 75 Wash.2d 200, 449 P.2d 391 (1969); *Wisconsin*—*Faltersack v. Vanden Boogaard*, 39 Wis.2d 64, 158 N.W.2d 322 (1968).

38. 124 F.2d 717 (7th Cir. 1941) [hereinafter cited as *Zurich*].

in the principle case, *Zurich* held the owner's insurer primarily liable by giving effect to the excess clause of the driver's policy.<sup>39</sup> The owner's policy contained an escape clause in its "other insurance" provision. Judge Major recognized the lack of compelling logic in his choice of which clause should be given effect<sup>40</sup> by stating that "[t]he old controversy as to which came first, the hen or the egg, would be almost as easy of solution as the instant problem."<sup>41</sup>

The basic premise of the *Zurich* case is that conflicting "other insurance" clauses are amenable to the usual rules of interpretation of insurance contracts for determining the intention of the parties.<sup>42</sup> The often quoted passage of *Zurich* pronounces that "[a] decision must rest upon a construction of the language employed by the respective insurers."<sup>43</sup> Implicit in this view is judicial recognition that "other insurance" clauses represent attempts by insurers to set varying limits of liability for different risk situations,<sup>44</sup> and that freedom to contract would be circumscribed if "other insurance" provisions were ignored.<sup>45</sup>

39. *Id.*, at 720.

40. For example, if one begins with the policy containing the escape clause, this insurer is no longer liable since the other policy provides other insurance to effectuate the former's escape provision. However, if one begins with the excess clause policy this insurer is only required to provide excess coverage because the policy with the escape clause is valid insurance to bring into force the former's excess provision. An excerpt from the case of *Pacific Indem. Co. v. Liberty Mut. Ins. Co.*, 269 Cal. App.2d 793, 75 Cal. Rptr. 559 (1969), expresses the circular riddle involved in attempting to reconcile conflicting clauses by relying solely on the language of the provisions:

We next examine the texts of the two insurance policies for enlightenment as to which insurer should be held primarily liable. In this process counsel for each insurer points to language in the comprehensive liability policy of the other insurer to establish coverage by the other insurer and then points to exculpatory language in the policy of his own client which purports to propel liability elsewhere in instances of dual coverage. From these exculpations each counsel triumphantly concludes that the liability of the other insurer is primary and that of his own client is excess . . . , this approach takes us nowhere except in a large circle.

*Id.* at 797-98, 75 Cal. Rptr. at 562.

41. 124 F.2d at 719.

42. *McFarland v. Chicago Express, Inc.*, 200 F.2d 5 (7th Cir. 1952); *Liberty Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 232 F. Supp. 76 (D. Mont. 1964); *Continental Gas. Co. v. American Fidelity & Cas. Co.*, 275 F.2d 381 (7th Cir. 1960); *Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 273 F.2d 189 (6th Cir. 1959); *Air Transp. Mfg. Co. v. Employers' Liab. Assurance Corp.*, 91 Cal. App.2d 129, 204 P.2d 647 (1949); *Dairyland Mut. Ins. Co. v. Anderson*, 102 Ariz. 515, 433 P.2d 963 (1967); *Consolidated Mut. Ins. Co. v. Bankers Ins. Co.*, 244 Md. 392, 223 A.2d 594 (1966). See generally *Automobile Liability Insurance*, *supra* note 13, at 847 Note, *Insurance—Conflicting "Other Insurance" Clauses*, 20 ARK. L. REV. 370, 372 (1967); Comment, "Other Insurance" Clauses: The LAMB-WESTON Doctrine, ORE. L. REV. 430, 433 (1968).

43. 124 F.2d at 720.

44. Watson, *The "Other Insurance" Dilemma*, 1966 INS. L.J. 151, 154.

45. See *Consolidated Mut. Ins. Co. v. Bankers Ins. Co.*, 244 Md. 392, 223 A.2d 594 (1966); *D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co.*, 96 Ariz. 399, 396 P.2d 20 (1964); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d



Thus, once the court found substantive differences in the clauses they felt bound to interpret the intent of the parties through a construction of the respective clauses.<sup>46</sup> However, if the two clauses were identical, the court recognized in dicta, that reconciliation through interpretation would be impossible.<sup>47</sup>

Another aspect of the *Zurich* decision was the honoring of an excess over an escape clause.<sup>48</sup> Several commentators attribute judicial preference of excess clauses over other types to the misapplication of the rules afforded "true" excess provisions.<sup>49</sup> The "true" excess clause is

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436 (1967) where the court clearly supports the idea that it is the function of the judiciary to attempt to carry out specifications contained in the "other insurance" clause. The court quoted directly from *Muncie v. Travelers Insurance Co.*, 253 N.C. 74, 79-80, 116 S.E.2d 474, 478 (1960):

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties . . . . Since the contractual provision is, as related to the facts of this case, a valid one, the parties are entitled to have it enforced as written. We cannot ignore any part of the contract.

269 N.C. at 345, 152 S.E.2d at 440.

46. 124 F.2d at 720.

47. *Id.*:

We think the logic of this reasoning [finding a difference between an excess and an escape clause] is made apparent by assuming that neither of the policies contained an "other insurance" provision or that both policies contained an "other insurance" provision in exactly the same language. It could not be seriously argued, in our opinion, but that under either of such situations the two insurers would be liable in proportion to the amount of insurance provided by their respective policies.

The writer was unable to find a case of concurrent coverage in which neither policy contained an "other insurance" provision. However, it seems logical that where each insurer would be primarily liable but for the other and neither has specifically accounted for such a contingency, each should be held liable for a prorata share of the loss.

Courts have consistently arrived at results in accord with the above *Zurich* dictum in cases involving conflicting identical "other insurance" clauses, *i.e.*, prorating the loss among the insurers on the basis of their respective limits of liability. The rationale for proration in prorata *vs.* prorata situations is that ordering the loss to be apportioned is merely in keeping with the expressed intent of both parties. In situations involving identical excess or escape clauses, the courts prorate because if effect were given to both clauses this would leave the insured without coverage. Also, since the language is identical there is no rational means available to distinguish between the clauses.

For examples see *prorata vs. prorata*—*Celina Mut. Cas. Co. v. Citizens Cas. Co.*, 194 Md. 236, 71 A.2d 20 (1950); Annot., 21 A.L.R.2d 611 (1952); *excess vs. excess*—*Employers Liab. Assurance Corp. v. Pacific Employer Ins. Co.*, 102 Cal. App.2d 188, 227 P.2d 53 (1951); *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*, 28 N.J. 554, 147 A.2d 529 (1959); *Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co.*, 163 F. Supp. 325 (D. Fla. 1958); Annot., 69 A.L.R.2d 1122 (1960); *escape vs. escape*—the writer was unable to find any American appellate decisions involving a conflict between this type of clause. *But see* *Weddell v. Road Transp. & Gen. Ins. Co.*, 2 K.B. 563 (1931) and *Gale v. Motor Union Ins. Co.*, [1928] 1 K.B. 359 (1926), where the loss was prorated.

48. See note 39 *supra* and accompanying text.

49. See *Concurrent Coverage*, *supra* note 14, at 326; *Automobile Liability Insurance*, *supra* note 13, at 852-53.

generally found in special policies issued to an insured which only provide coverage above that afforded in other stated policies.<sup>50</sup> It is more likely, however, that the principle factor influencing the court's favor of the excess clause is the general dislike for clauses which seek to avoid all liability.<sup>51</sup> The reasoning behind disfavor of escape clauses appears to be based on the misuse of the insurance doctrine of resolving questions concerning the existence of coverage against the insurer.

Courts have continued to favor excess over escape clauses as did *Zurich*.<sup>52</sup> Consequently, when an excess provision conflicts with either a prorata<sup>53</sup> or an escape<sup>54</sup> clause the insurer using the latter types is held primarily liable.<sup>55</sup> Because the above situations frequently occur, courts presume the intent of the parties on the basis of the types of clauses involved.<sup>56</sup> The results, as to whether the owner's or driver's insurer is primarily liable, have also been generally consistent in finding that the owner's insurer provides primary coverage.<sup>57</sup>

Cases such as *New Amsterdam Casualty Co. v. Certain Underwriters at Lloyds, London*,<sup>58</sup> extend these rules of presumed intent one step further into a rule of thumb that the insurer of the vehicle involved

50. See, e.g., *General Ins. Co. v. Saskatchewan Gov't Ins. Office*, 238 Ore. 8, 391 P.2d 616 (1964). See generally 16 G. COUCH, *supra* note 13, at § 62:68.

51. 8 J. APPLEMAN, *supra* note 13, at § 4914 (Supp. 1970).

52. See note 39 *supra* and accompanying text.

53. To effectuate this preference the courts hold that the policy containing the excess clause is valid "other insurance," thus the insurer whose policy contains the prorata clause is primarily liable. See, e.g., *General Accident Fire & Life Assurance Corp. v. Piazza*, 4 N.Y.2d 659, 152 N.E.2d 236, 176 N.Y.S.2d 976 (1958); *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959); *Maryland Cas. Co. v. American Family Ins. Group*, 199 Kan. 373, 429 P.2d 931 (1967); *State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (1967); *Wrenn & Outlaw, Inc. v. Employers' Liab. Assurance Corp.*, 246 S.C. 97, 142 S.E.2d 741 (1965); *Continental Nat'l Am. Group v. Burleson*, 283 Ala. 671, 220 So.2d 611 (1969); 16 G. COUCH, *supra* note 13, at § 62:71; 8 J. APPLEMAN, *supra* note 13, at § 4914; Annot., 76 A.L.R. 502, 505 (1961).

54. See, e.g., *New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London*, 34 Ill.2d 424, 216 N.E.2d 665 (1966); *Federal Ins. Co. v. Prestemon*, 278 Minn. 218, 153 N.W.2d 429 (1967); *Automobile Liability Insurance*, *supra* note 13, at 854; 16 G. COUCH, *supra* note 13, at § 62:76; Annot., 46 A.L.R.2d 1163, 1165 (1956).

55. There are few cases in which an escape and a prorata clause have conflicted. However, the usual result has been to hold the insurer whose policy contains the prorata clause primarily liable. *McFarland v. Chicago Express, Inc.*, 200 F.2d 5 (7th Cir. 1952); *Miller v. Allstate Ins. Co.*, 66 Wash.2d 871, 405 P.2d 712 (1965); Annot., 46 A.L.R.2d 1163, 1167 (1956).

56. See *Continental Nat'l Am. Group v. Burleson*, 283 Ala. 671, 220 So.2d 611 (1969); *Consolidated Mut. Ins. Co. v. Bankers Ins. Co.*, 244 Md. 392, 223 A.2d 594 (1966); *Gen. Ins. Co. of Am. v. State Farm Ins. Co.*, 75 Wash.2d 200, 449 P.2d 391 (1969).

57. See, e.g., notes 53-54 *supra* where the court in each of the cited cases held the owner's insurer primarily liable.

58. 34 Ill.2d 424, 216 N.E.2d 665 (1966).

is presumed to have intended to become primarily liable in a concurrent coverage situation.<sup>59</sup> The *New Amsterdam* opinion illustrates the importance courts ascribe to the relationship of the insured to the vehicle in concurrent coverage situations by restating the *Zurich* holding<sup>60</sup> in terms of "driver" and "owner."<sup>61</sup> Arguably, the *New Amsterdam* case represents a "codification" of prior cases into the generality that there exists a presumption that the insurer of the owner will be primarily liable, although a portion of the holding appears to be based on the types of clauses involved. Insurance companies recognize the presumption and seek to facilitate judicial ease in employing it by the draftsmanship found in almost all general policies.<sup>62</sup> If this were not the case, insurance companies could use excess clauses in their coverage of permissive users and avoid the result. At least one court has explicitly recognized the "owner-pays" presumption while taking judicial notice of the custom and practice of the insurance industry.<sup>63</sup>

Since the majority view ultimately rests on the particular language of the "other insurance" provision,<sup>64</sup> its method of reconciliation is subject to change as the draftsmanship of the various provisions is altered. The specific escape clause is an example of the use of draftsmanship to alter the normal result that escape clauses are disfavored.<sup>65</sup> [this policy

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59. See *Pacific Indem. Co. v. Liberty Mut. Ins. Co.*, 269 Cal. App.2d 793, 75 Cal. Rptr. 559 (1969), where the court explicitly recognizes the presumption in the following language:

Respondent . . . relies on the general rule that, other things being equal, primary liability falls on the insurer of the owner rather than on the insurer of the operator. No statute compels such a result, and its origin apparently lies in custom and practice within the insurance business, which is followed by the courts . . . .

*Id.* at 798-99, 75 Cal. Rptr. at 563.

60. 124 F.2d at 720.

61. 34 Ill.2d 424, 428-29, 216 N.E.2d 665, 667 (1966).

62. See, e.g., INSURANCE INFORMATION INSTITUTE, *SAMPLE INSURANCE POLICIES: PROPERTY LIABILITY COVERAGES* 20 (1968):

*Other Insurance*: If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectable insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectable insurance.

If such a clause appears in both the driver's and owner's policy, then the owner's policy would provide prorata coverage and the driver's policy would extend excess coverage. Since the courts have consistently held the insurer whose policy contains the prorata clause primarily liable, the "other insurance" provision, *supra*, illustrates the insurers' acceptance of the "owner-pays" rule.

63. See note 59 *supra*.

64. See notes 42-45 *supra* and accompanying text.

65. See note 54 *supra* and accompanying text.

covers] "any other person, but only if no other valid and collectable automobile liability insurance, *either primary or excess* . . . is available to such person . . . ." <sup>66</sup> By the insertion of the phrase "either primary or excess," insurers have succeeded in reversing the presumptions in favor of excess clauses <sup>67</sup> and that the owner's insurer is primarily liable. <sup>68</sup> Consequently, when faced with a conflict between an excess and a specific escape clause the courts have held the insurer whose policy contains the excess provision primarily liable. <sup>69</sup> The courts reason that since insurers employing specific escape provisions have anticipated the existence of an excess clause in the driver's liability policy and have expressly contracted to avoid liability in concurrent coverage situations, their express intentions should be enforced. <sup>70</sup>

At first glance these cases would appear to foster an endless battle of draftsmanship between insurers, thus creating an incentive for additional litigation. <sup>71</sup> However, specific escape clauses have generally been used only in garage liability <sup>72</sup> and automobile leasing <sup>73</sup> policies which represent unique business relationships. Although these decisions represent exceptions to the usual results reached when the standard presumptions are used, the reasoning is in keeping with general contract doctrine which

66. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 344, 152 S.E.2d 436, 439 (1967) (emphasis added). See also *Faltersack v. Vanden Boogaard*, 39 Wis.2d 64, 65, 158 N.W.2d 322, 323 (1968). *Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954) in the following language provides an example of early specific escape clauses:

The insurance does not apply:

\* \* \* \*

(4) to any liability for such loss as is covered on a primary, contributory, excess, or any other basis by insurance in another insurance company.

*Id.* at 367.

67. See notes 53-54 *supra* and accompanying text.

68. See notes 59-63 *supra* and accompanying text.

69. *Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954); *Government Employees Ins. Co. v. Globe Indem. Co.*, 415 S.W.2d 581 (Ky. 1967); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967); *Faltersack v. Vanden Boogaard*, 39 Wis.2d 64, 158 N.W.2d 322 (1968); *Indiana Lumbermans Mut. Ins. Co. v. Mitchell*, 409 F.2d 392 (7th Cir. 1969) (applying Illinois law). *Contra*, *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St. 2d 45, 261 N.E.2d 128 (1970).

70. See note 45 *supra* and accompanying text.

71. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413 (1970):

The myriad problems attendant upon "other insurance" clauses is not new, and the conflicting solutions adopted demonstrate a frustrating judicial attempt to resolve what appears to be an endless interindustry semantic battle.

*Id.* at 414. Cf. *United Services Auto, Ass'n v. Hartford Accident & Indem. Co.*, 220 Tenn. 120, 414 S.W.2d 836 (1967).

72. See, e.g., *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967); *Faltersack v. Vanden Boogaard*, 39 Wis.2d 64, 158 N.W.2d 322 (1968); *Indiana Lumbermans Mut. Ins. Co. v. Mitchell*, 409 F.2d 392 (7th Cir. 1969).

73. See, e.g., *Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954).

allows parties to contract for what they desire.<sup>74</sup>

The case of *Pacific Indemnity v. Liberty Mutual Insurance Co.*<sup>75</sup> represents a slightly different approach within the majority view's framework. The issue in *Pacific Indemnity* was which of two insurers, either the insurer of the lessee-operator or the insurer of the lessor-owner, should bear the loss attributable to the operation of an automobile leased for a two-year period. The court concluded that an examination of the two policies, which both contained excess clauses, led it "nowhere except in a large circle."<sup>76</sup> After stating that there is no public policy involved in litigation on concurrent coverage issues between insurers since it is never contended that the injured third party is not protected,<sup>77</sup> the court set forth a method of resolving the dispute:

. . . in the construction of ambiguous policies the literal terms of the policies themselves carry less weight than the substance of the transaction involved. . . . If the evidence in a particular case shows the parties intended some other arrangement, then as with other contracts, the specific intention of the parties will displace a general intention attributable to them in their silence.<sup>78</sup>

The *Pacific Indemnity* theory carries the search for intent beyond the literal language of the "other insurance" clauses into an examination of the substance of the transaction.<sup>79</sup> Specifically, the court in *Pacific Indemnity* found the lessee's insurer primarily liable because of a provision in the leasing contract in which the lessee agreed to assume the responsibility of insuring the vehicle.<sup>80</sup> However, in situations where there is a lack of external evidence, the *Pacific Indemnity* approach presumes that the owner's insurer intended to provide coverage where other insurance is available.

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74. 1 A. CORBIN, CORBIN ON CONTRACTS § 1 (1963).

75. 269 Cal. App.2d 793, 75 Cal. Rptr. 559 (1969) [hereinafter cited as *Pacific Indemnity*].

76. *Id.* at 797, 75 Cal. Rptr. at 562.

77. *Id.* at 796, 75 Cal. Rptr. at 561.

78. *Id.* at 798-99, 75 Cal. Rptr. at 563.

79. *Id.* at 799, 75 Cal. Rptr. at 563:

But the rule placing primary liability on the insurer of the owner in instances of duplicate coverage is a product of presumed intention and is only applied when the parties have made no specific agreement on the subject. If the evidence in a particular case shows the parties intended some other arrangement, then, as with other contracts, the specific intention of the parties will displace a general intention attributable to them in their silence. Their specific agreement will override the general rule.

80. *Id.* at 800, 75 Cal. Rptr. at 564-65.

*Minority View*

The leading case presenting the minority view<sup>81</sup> is *Oregon Automobile Insurance Co. v. United States Fidelity & Guaranty Co.*,<sup>82</sup> in which the Ninth Circuit Court of Appeals was faced with conflicting excess and escape clauses on facts similar to those of the principal case. The insurer whose policy contained the escape clause appealed a judgment assigning primary liability to it. The basis of the decision was that the policy containing the excess clause constituted "other insurance" to effectuate the escape clause. The circuit court reversed, and in holding that liability should be prorated among the insurers the court specifically rejected the majority view as a means to reconcile concurrent liability. By doing so, the court created a different<sup>83</sup> means of loss allocation among concurrent insurers:

In our opinion the "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them . . . Here, where both policies carry like "other insurance" provisions, we think they must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case. The proration is to be applied in respect both of damages and of the expense of defending the suits.<sup>84</sup>

The minority view represents a rejection of the majority's principle assumption that conflicting "other insurance" clauses are reconcilable through interpretation.<sup>85</sup> It views attempts to assign primary and secondary liability on the basis of the language of the provisions as a "circular riddle".<sup>86</sup> "[The] reasoning [of the majority] appears to us com-

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81. Those states following the minority rule are: *Colorado*—*State Farm Mut. Auto. Ins. Co. v. Travelers Indem. Co.*, 301 F. Supp. 1131 (D. Colo. 1969); *Indiana*—*Allstate Ins. Co. v. American Underwriters, Inc.* 312 F. Supp. 1386 (N.D. Ind. 1970); *Iowa*—*Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413 (1970); *Louisiana*—*Graves v. Traders & Gen. Ins. Co.*, 252 La. 709, 214 So.2d 116 (1968); *Oregon*—*Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959); *Tennessee*—*United Services Auto. Ass'n v. Hartford Accident & Indem. Co.*, 220 Tenn. 120, 414 S.W.2d 836 (1967); *Texas*—*Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969).

82. 195 F.2d 958 (9th Cir. 1952).

83. See note 47 *supra* in which it is pointed out that the majority view also prorates losses, but only in cases where the clauses are *identical*.

84. 195 F.2d at 960.

85. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959).

86. Attempting to reconcile conflicting clauses through a construction of the

pletely circular, depending as it were, on which policy one happens to read first."<sup>87</sup> Courts adopting the minority view question the efficacy of searching for the intent of insurers through a construction of the clauses when they are but "fortuitous adversaries"<sup>88</sup> with no privity of contract existing between them. Furthermore, advocates of the minority position question the need of construction when it is self-evident that the intentions of both the insurers are to reduce or eliminate liability in this instance.<sup>89</sup> That these problems led Judge Beamer, in the principal case, to adopt the minority view, is evidenced by the following language:

Cases of this type cannot be resolved either by a literal reading of the language used or by an inquiry into intent.

\* \* \*

And the only way to effectuate the intent of both companies would be by holding neither liable—a result which would obviously be contrary to public policy. Under the circumstances, the only fair solution, and the one which this court believes would be adopted by the Indiana courts, is to find the excess clause and the escape clause mutually repugnant, and to require the two insurers to share the loss in proportion to the limits of their respective policies.<sup>90</sup>

In several recent cases adopting the minority position, courts have advanced a public policy argument which has been rejected in at least one majority rule holding.<sup>91</sup> This public policy argument is best stated in *United Services Automobile Association v. Hartford Accident & Indemnity Co.*<sup>92</sup>

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language, *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413, 417 (1970) states it "is at best a pseudo-solution in that it only aggravates a circular riddle." See also *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 589 (Tex. 1969); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959).

87. 195 F.2d at 960.

88. Taken from the title of the following article dealing with concurrent coverage in loading and unloading situations: Brown and Risjord, *Loading and Unloading: The Conflict Between Fortuitous Adversaries*, 29 INS. COUNSEL J. 197 (1962).

89. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *Allstate Ins. Co. v. American Underwriters, Inc.*, 312 F. Supp. 1386, 1388 (N.D. Ind. 1970).

90. 312 F. Supp. at 1388.

91. Public policy arguments have been advanced in *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413 (1970) and *United Services Auto. Ass'n v. Hartford Accident & Indem. Co.*, 220 Tenn. 120, 414 S.W.2d 836 (1967). For a discussion of *Pacific Indemnity*, which rejects the public policy argument, see notes 75-80 *supra* and accompanying text.

92. 220 Tenn. 120, 414 S.W.2d 836 (1967).

Under the authorities urged upon us [majority view cases yielding conflicting results], it seems inescapable that the rights of the assured become badly obscured, if not defeated, by the contractual contest engaged in by casualty insurers.<sup>93</sup>

However, this argument lacks persuasiveness because in the usual situation, litigation occurs either before the insured's liability is determined, in the form of a declaratory judgment or after one insurer has assumed primary liability, in an action for contribution.<sup>94</sup>

The minority courts also charge that the majority view "encourages the continuing battle of draftsmanship of still more specific policy terms."<sup>95</sup> Since the five most recent cases<sup>96</sup> adopting the minority view involved specific escape clauses conflicting with excess clauses, one might consider them as a direct response to this charge.<sup>97</sup> If the minority view becomes widely accepted, one commentator contends that it will lower insurance premiums by reducing the amount of costly litigation insurers undergo to determine primary liability.<sup>98</sup>

### Conclusion

At first glance, the prorata rule adopted by Judge Beamer is appealing because of its simplicity of application. However, the modified application of the majority view found in *Pacific Indemnity*<sup>99</sup> provides a more legally justifiable solution consonant with accepted contract principles. *Pacific Indemnity* takes a forthright approach by presuming an intent except where the parties can prove a specific intent. Such a rule permits parties involved in unique risk situations to determine responsibility for coverage as desired. This conclusion is based on the premise

93. *Id.* at 129, 414 S.W.2d at 840.

94. No case was found in which the insured was left without coverage while the insurers litigated the issue of liability allocation.

95. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 588 (Tex. 1969). See *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413, 417 (1970). See also *Concurrent Coverage*, *supra* note 14, at 322.

96. *United Services Auto. Ins. Ass'n v. Hartford Accident & Indem. Co.*, 220 Tenn. 120, 414 S.W.2d 836 (1967); *Graves v. Traders & Gen. Ins. Co.*, 252 La. 709, 214 So.2d 116 (1968); *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *State Farm Mut. Auto. Ins. Co. v. Travelers Indem. Co.*, 301 F. Supp. 1131 (D. Colo. 1969); *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, —Iowa—, 175 N.W.2d 413 (1970).

97. It seems implicit in the courts' language criticizing the battle of draftsmanship that they view the minority rule as a means of alleviating some of the pressure on the universally overloaded court dockets, thus indirectly advancing a public interest by reducing the waiting period now facing any litigant.

98. See, Note, *Conflicting Interpretation of "Other Insurance" Clauses*, 28 IND. L.J. 429, 435 (1953).

99. 269 Cal. App.2d 793, 75 Cal. Rptr. 559. See notes 75-80 *supra* for the discussion of the California court's method of loss allocation in a concurrent coverage situation.



that there is no overriding public policy considerations which would warrant closing out parties' ability to contract as they desire. Thus, it could be argued that the minority view is the more arbitrary of the two views because of its total disregard of "other insurance" clauses.

The ideal solution to the problem of concurrent liability insurance coverage would be for insurers to formulate inter-company agreements establishing rules for loss allocation in reoccurring problem areas. The multitude of cases litigated on this issue illustrates that insurers have placed the burden for creating a solution on the judicial system.

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